Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CHARTER COMMUNICATIONS, INC.,
CHARTER COMMUNICATIONS PROPERTIES, LLC,
AND PAUL G. ALLEN,
PETITIONERS,

v.

COUNTY OF SANTA CRUZ, CALIFORNIA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case poses important legal questions for the cable industry and beyond. Here, the district court ruled after an eight-day trial that Respondent County of Santa Cruz had acted unlawfully in attempting to extract monetary payments and other concessions from its cable franchisee, Petitioner Charter Communications Properties, LLC, in return for the County's consent to the acquisition of Charter by Petitioner Paul G. Allen. The district court ruled that the County's actions violated the Cable Act and related FCC regulations, the First Amendment, and the franchise agreement. The U.S. Court of Appeals for the Ninth Circuit reversed, concluding that the trial court had applied the wrong standard in not showing substantial deference to the County.

The questions presented are as follows:

1. Whether a local government's actions in refusing to consent to a change of control of a cable franchisee are entitled to substantial deference, where such deference conflicts with the uniform national policy established by the Cable Act and related FCC regulations.

2. Whether a cable operator waives its right to challenge actions of a local government on First Amendment grounds by virtue of having entered into a franchise agreement with the local government.

3. Whether a local government's actions in refusing to consent to a change of control of a cable franchisee constitute "legislative acts" subject to substantial deference, where the local government acts pursuant to its contractual obligations under a franchise agreement.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Charter Communications, Inc., has no parent corporation. No publicly held company owns 10 percent or more of the stock of Charter Communications, Inc.

The parent company of petitioner Charter Communications Properties, LLC, is Charter Communications, Inc. No publicly held company owns 10 percent or more of the stock of Charter Communications Properties, LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Charter Communications, Inc., Charter Communications Properties, LLC, and Paul G. Allen respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. at 1a-13a) is reported at 304 F.3d 927. The district court's findings of fact and conclusions of law after bench trial (App. at 14a-78a) are reported at 133 F. Supp. 2d 1184.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 2002. A petition for rehearing was denied on November 15, 2002. (App. at 79a-80a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides that "Congress shall make no law * * * abridging the freedom of speech."

The provisions of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779; the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460; and the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, (collectively, the "Cable Act") and implementing regulations are involved in this case. Due to the length of

these provisions, the pertinent text thereof is set forth in Appendix D to the Petition. (App. at 81a-119a.)

STATEMENT OF THE CASE

In 1998, Petitioner Paul G. Allen entered into an agreement to purchase Petitioners Charter Communications, Inc. and Charter Communications Properties, LLC (collectively "Charter"). Charter and Mr. Allen then sought approval for this transfer of ownership from the approximately 470 local franchising authorities, including Respondent County of Santa Cruz, California (the "County"), for which Charter served as cable franchisee. When the County refused to give its consent to the change in control unless Charter acquiesced to monetary payments and other concessions in excess of federal limits, Petitioners brought this 42 U.S.C. § 1983 action against the County. Petitioners alleged violations of their rights under the Cable Act, the First Amendment, and the franchise agreement. The actions of the County here -- using a change in ownership as a means to extract impermissible monetary payments and concessions from a local cable franchisee -- set a dangerous precedent, with the potential for disastrous effects on Charter and the entire cable industry.

1. In July 1998, Paul Allen entered into an agreement to purchase approximately 94 percent of the outstanding shares of Charter and certain Charter affiliates as part of a $4.5 billion national transaction. At the time, Charter had nearly 500 local cable franchises[1] and approximately 1.2 million cable subscribers nationwide. (App. at 21a.)

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[1] Every cable television operator (with limited exceptions) must obtain a franchise from the local community in which it intends to do business. 47 U.S.C. § 541(b)(1).

2. One of Charter's cable franchises included the southern portion of Santa Cruz County, California. Charter had obtained this franchise in 1998 from a previous franchisee. The franchise agreement between Charter and the County required Charter to pay a 5 percent franchise fee to the County, which is the maximum fee allowed by federal law. (App. at 27a.) In addition, the agreement incorporated certain provisions of the County's Cable Ordinance into the terms of the contract, including those relating to a change of control. Under these provisions, Charter was required to obtain the County's consent to any subsequent transfer of ownership, with such consent not to be "unreasonably withheld." (*Id.* at 42a.)

3. On August 18, 1998, Charter formally notified all of its local franchising authorities, including the County, of the transaction involving Mr. Allen. On that date, Charter furnished each local government with a fully completed FCC Form 394, thereby requesting the consent of the County and triggering the 120-day transfer process set forth in the Cable Act. *See* 47 U.S.C. § 537. Form 394 is the specific application promulgated by the FCC for use in seeking transfer approval from local franchise authorities.[2]

4. The County responded to Charter's submission by requesting voluminous information regarding the Charter/Allen transaction. The County's request was set out in a nine-page letter that sought a detailed response regarding

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[2] Charter's Form 394 established that, among other things, (i) Charter would continue to be the franchisee; (ii) the transaction would be financed from Mr. Allen's personal assets and would not result in any increase in Charter's debt; (iii) Charter's management would remain under the personal direction of Jerard Kent, Charter's CEO; (iv) the sale required the consents from local franchising authorities representing 90 percent of total subscribers; and (v) Mr. Allen had sufficient assets to close the transaction and to operate Charter's system. (App. at 22a-23a.)

over 70 categories of information. (App. at 28a.) The County later propounded a second request, nearly eight-pages long, for 31 additional categories of information. (*Id.* at 33a-34a.) The County also insisted that Mr. Allen and Charter fund a "due diligence" study, at an estimated cost of $39,000. (*Id.* at 26a-27a; 30a.)

Charter complied with the County's first information request and provided a two-inch thick response with supporting documentation. This response included (i) financial statements; (ii) ten-year projected income statements; (iii) information about the purchase price; (iv) information about Mr. Allen's management role; (v) information that the debt of the Charter affiliate which held the franchise with the County would be reduced by $38 million; and (vi) reassurance that the purchase price could not, under federal rate regulations, be used to increase rates. (App. at 29a.)

After the County issued its second request for information, Charter and Mr. Allen informed the County that they believed this request to be unreasonable and declined to respond. (App. at 34a-35a.) At that time, the County also demanded that Charter pay some sort of "mitigation fee" in return for its approval. Charter refused to pay any such fee.

5. Thereafter, on December 8, 1998, the County adopted a "resolution" denying its consent to the transfer without prejudice. In the denial resolution, the Board of Supervisors blamed Charter's refusal to comply with the County's information requests and professed concern over the impact of the transaction. No representative of Charter or Mr. Allen was notified in advance of this meeting. (App. at 38a-39a.)

A week later, the Board of Supervisors authorized its negotiators to consent to the transfer if Charter agreed to a two-year rate freeze and a payment to the County of

approximately $500,000. Charter refused these demands. (App. at 41a.)

On December 23, 1998, the Charter/Allen transaction closed.[3] The County then issued a notice that Charter had violated the franchise agreement by closing without the County's consent and threatened to revoke the franchise and/or impose liquidated damages. (App. at 42a.)

6. Charter and Mr. Allen filed this declaratory action in the U.S. District Court for the Northern District of California. After an eight-day bench trial involving approximately a dozen witnesses, thousands of pages of exhibits and extensive briefing by the parties, the district court ruled in favor of Charter and Mr. Allen. The district court's thorough opinion found that the County's denial of consent was based on Petitioners' failure to comply with the County's information requests, demand for a pre-funded due diligence study, request for a cash payment of $500,000, and demand for a further rate freeze. (App. at 42a-43a.) Based on these findings of fact, the district court held that the County had violated the Cable Act, the First Amendment, and the franchise agreement by denying its consent to the transfer.

The district court set out a detailed analysis of the FCC's 120-day regulation and Form 394. The district court found that the County's first information request was "so unreasonable in scope that it should have been deemed ineffective under the FCC rule [47 C.F.R. § 76.502] to require a response." (App. at 61a-62a.) As for the County's second information request, the court held that this request was

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[3] Of the more than 470 local franchise authorities with whom Charter dealt, only four (the County and three other communities also represented by the County's outside counsel) refused their consent. (App. at 24a.)

"unreasonable" because of its timing, having been made after the required 30-day window, and because of its scope. (*Id.* at 62a-63a.)

The district court also found that the County's request for Charter to fund the due diligence study and its request for a $500,000 mitigation fee violated the 5 percent maximum franchise fee limitation established in 47 U.S.C. § 542 of the Cable Act. The district court also found that the County's request that Charter and Mr. Allen accept an extension of the existing rate freeze violated § 543(a)(1) of the Cable Act and the FCC's implementing order. (App. at 70a-71a.)

Finally, the district court held that the County's actions had violated the First Amendment rights of the plaintiffs. The court noted that the operation of a cable franchise "plainly implicate[s] First Amendment interests." (App. at 72a (citation omitted).) The district court then applied the intermediate level of scrutiny applicable for government regulations that incidentally burden First Amendment rights. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968). Based on this analysis, the district court concluded that "the County's approach burdened substantially more speech than was necessary to further its legitimate interests." (App. at 77a.)

7. The U.S. Court of Appeals for the Ninth Circuit reversed the lower court's decision. In considering whether the County's denial of consent was reasonable, the court of appeals explained that it first needed to answer a "preliminary question," namely, "is the County owed any deference to its determinations of what is reasonable under the circumstances?" (App. at 5a.) The court of appeals answered this question in the affirmative, concluding that the County must be accorded substantial deference because the County's decision to deny consent was a "legislative action." (*Id.* at 5a-6a.)

The Ninth Circuit then examined whether there was a sufficient basis for the County's denial of its consent to the change of control. The court of appeals concluded that, based on this deferential standard, "it was not unreasonable for the County to be concerned about Allen's true net worth and about the relationship of that wealth to the viability of the enterprise." (App. at 9a.) According to the appeals court, the County was entitled to be concerned that Mr. Allen had paid what, in the County's view, was a significantly above market-value purchase price for Charter. The Ninth Circuit concluded that it "cannot say the County acted without a rational basis" for its decision to deny consent. (*Id.* at 11a.)

The court of appeals also dismissed the First Amendment issues raised by Charter and Mr. Allen. It held that, because "Charter voluntarily entered into an agreement under which the County had to approve any transfer of the franchise," Charter had "waived its right to claim that a denial of a transfer violated its First Amendment rights." (App. at 11a-12a.)

A timely petition for rehearing and rehearing en banc was denied. (App. at 79a-80a.)

REASONS FOR GRANTING THE PETITION

I. The Substantial Deference Accorded By The Ninth Circuit To A Local Government's Decision To Refuse Consent To A Change Of Control Conflicts With The Uniform National Policy Established By The Cable Act And FCC Regulations

Based on its conclusion that the County was entitled to substantial deference, the court of appeals eschewed any real scrutiny of the County's rationale for its denial of consent to Charter's change of control. In fact, the Ninth Circuit declined even to apply the requirements of the Cable Act, stating that it could "see no reason for either the district court or this panel to reach the issues regarding the Cable Act." (App. at 3a n.3.) Yet, in enacting the Cable Act, Congress clearly intended to establish a uniform national policy for cable television. There can be no basis for the Ninth Circuit's failure to apply the Cable Act here. The national scheme established by the Cable Act nowhere provides for the extreme deference accorded the County in this case.

The consequences of the Ninth Circuit's erroneous approach are serious. In essence, it eliminates meaningful judicial review of a local government's actions in the transfer process. By fatally distorting the uniform national policy for cable regulation, the Ninth Circuit nullifies Congress' effort to streamline cable regulation and threatens the flow of capital into the cable industry.

A. The Cable Act And Implementing FCC Regulations Establish A Uniform National Policy Which Circumscribes The Role Of Local Franchising Authorities

In establishing a national framework for the regulation of cable television, Congress carefully constrained the role of

local governments. The unbridled deference accorded the County by the court of appeals is clearly inconsistent with this national policy enunciated in the Cable Act and implementing FCC regulations.

1. In the Cable Communications Policy Act of 1984, and in subsequent amendments in 1992 and 1996, Congress was explicit that its purpose was to "establish a national policy concerning cable communications." 47 U.S.C. § 521(1). Congress was concerned about the unwieldy, conflicting patchwork of rules and regulations being imposed by various municipal governments across the country. Through a uniform national policy, it sought to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." *Id.* § 521(6). In doing so, Congress aimed to limit the role of local authorities, expressly stating that the Cable Act and implementing FCC regulations were intended to "establish guidelines for the exercise of Federal, State and local authority with respect to the regulation of cable systems." *Id.* § 521(3).

2. This Court and the lower courts have recognized on numerous occasions the preeminence of national cable policy and the concomitant limited role of local franchising authorities in this national scheme.

Thus, in both *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984), and *City of New York v. FCC*, 486 U.S. 57 (1988), this Court upheld federal cable regulations against local attempts to regulate the cable industry. In both cases, this Court acknowledged the FCC's efforts, which were in line with Congress' intentions, to bring uniformity to important aspects of the cable industry. The *Capital Cities Cable* Court noted that "uniform national communications policy with respect to cable systems would be undermined if state and local governments were permitted to regulate in

piecemeal fashion the signals carried by cable operators pursuant to federal authority." 467 U.S. at 714. Likewise, in *City of New York*, this Court recognized the "compelling need for national uniformity in cable television technical standards" and the "necessity to rationalize, interrelate, and bring into uniformity the myriad standards [then] being developed by numerous jurisdictions." 486 U.S. at 60 (citation and internal quotation marks omitted).

Examples of lower courts adhering to these same national policy principles abound. For example, the court of appeals in *Time Warner v. FCC*, 56 F.3d 151 (D.C. Cir. 1995), ruled that the Cable Act preempted rate regulation and components of the basic service tier. As that court explained, the Cable Act was "designed to establish a national cable policy and to facilitate innovation and competition in the cable industry by limiting rate regulation. . . ." *Id.* at 187 (concluding it was "Congress's clear intention in the 1992 Cable Act to preempt local regulation of the components of the basic tier." *Id.* at 198.).[4]

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[4] *See also City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001) (striking down as preempted a local ordinance setting up an application process for awarding franchises to provide telecommunications services), *cert. denied*, 534 U.S. 1079 (2002); *Time Warner Cable v. Bloomberg L.P.*, 118 F.3d 917 (2d Cir. 1997) (enjoining city's attempt to place commercial programming in public, educational, or governmental access channel in contravention of Cable Act); *Tribune-United Cable of Montgomery County v. Montgomery County*, 784 F.2d 1227 (4th Cir. 1986) (staying county's efforts to enforce penalties provision of franchise agreement due to request to modify franchise agreement under Cable Act); *City of Ottawa v. Sammons Communications, Inc.*, 836 F. Supp. 555 (N.D. Ill. 1993) (striking down local application of rate provisions of 1984 Cable Act); *Jones Intercable, Inc. v. City of Stevens Point*, 729 F. Supp. 642 (W.D. Wis. 1990) (striking down ordinance requiring a cable operator to carry specific cable services).

In the context of this statutory and regulatory structure, which gives preeminence to the national policy and restricts the role of local governments, the deference afforded the County by the court of appeals here is misguided and improper.

B. The Substantial Deference Accorded By The Ninth Circuit To The Local Government Is Contrary To The Rules And Procedures For A Change of Control Established By The Cable Act And Implementing FCC Regulations

The Cable Act and implementing FCC regulations set out the general parameters relating to the role of local franchising authorities in connection with transfers of control. In doing so, a critical federal concern was that individual local governments not be permitted to use the transfer process as a pretext to extract otherwise impermissible concessions from cable operators. Thus, the FCC clearly stated that

> in exercising their transfer jurisdiction, franchising authorities may not seek to circumvent the Commission's authority over rate regulation, franchise fees or other matters.

In re Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection & Competition Act of 1992, 8 F.C.C.R. 682, ¶ 39 n.38 (1993) (hereinafter "1993 Order"). The FCC clearly understood the opportunities for mischief if hundreds, or even thousands, of local franchising authorities were able to use the approval of transfers as a basis to negotiate concessions of all sorts.

However, such mischief is precisely what the district court found occurred here. The County "tried to do exactly what footnote 38 and federal law prohibit." (App. at 71a.)

The district court properly held that the County's demands were illegal and in direct contravention of the federal limitations established by the Cable Act and related regulations. Yet, because of its deference to the County, the Ninth Circuit concluded that it need not address these Cable Act violations. The appeals court's deferential standard served to remove effective judicial review and countenanced multiple violations of the Cable Act. This refusal to apply the Cable Act was erroneous and should be reviewed by this Court.

1. The FCC has established procedures for transfers of control which preclude the multiple, burdensome information requests propounded by the County here. Under federal law, the local franchising authorities have "120 days to act upon any request for approval" of a sale or transfer. 47 U.S.C. § 537. The FCC also developed FCC Form 394 for cable franchisees to submit when seeking transfer approval from local franchising authorities.[5]

The district court properly held that the County's voluminous and irrelevant information requests were directly contrary to these procedures for transfers. The County's reliance on Charter's refusal to meet its unlawful information demands was an improper basis to deny consent to the transfer. This federal law violation is not entitled to "deference."

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[5] Form 394 was designed to include "the information necessary to establish the legal, technical and financial qualifications of the proposed transferee." *See* 1993 Order at ¶¶ 85-86. Beyond the information included with Form 394, local franchising authorities may request only additional information that is "reasonably necessary to determine the qualifications of the proposed . . . transferee." *See In re Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection & Competition Act of 1992*, 10 F.C.C.R. 4654, ¶ 50 (1995).

2. The Cable Act also imposes a cap of 5 percent of annual gross revenues on franchise fees "or assessments of any kind" that may be collected by a local government from a cable operator. 47 U.S.C. § 542(b). This provision has been strictly interpreted to prevent local governments from circumventing this cap by manufacturing various "miscellaneous" costs for a franchisee to pay. *See id.* § 542(g).[6]

The district court recognized the County's demands that Charter fund a due diligence study and make a $500,000 "mitigation payment" for what they were -- a "blatantly illegal" additional assessment against a cable operator in contravention of the Cable Act. (App. at 70a.) Again, deference cannot excuse this Cable Act violation.

3. The Cable Act prohibits franchising authorities from regulating rates in a manner which is inconsistent with its terms. 47 U.S.C. § 543. This section sets out in detail the rules regarding regulation of cable rates. *Id.* These rules severely restrict the local government's ability to regulate rates. 47 C.F.R. § 76.910.[7]

The County's demand for a further rate freeze in order to approve the transfer was impermissible under these federal cable regulations. Consequently, the district court found a

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[6] *See, e.g., Robin Cable Sys., L.P. v. City of Sierra Vista*, 842 F. Supp. 380, 381 (D. Ariz. 1993); *Time Warner Entm't Co. v. Briggs*, 1993 WL 23710, at *6 (D. Mass. Jan. 14, 1993); *Birmingham Cable Communications, Inc. v. City of Birmingham*, 1989 WL 253850, at *1 (N.D. Ala. May 5, 1989).

[7] *See also Cablevision Sys. Corp. v. Town of East Hampton*, 862 F. Supp. 875, 883-84 (E.D.N.Y. 1994), *aff'd*, 57 F.3d 1062 (2d Cir. 1995); *City of Ottawa*, 836 F. Supp. at 564-65.

violation of the Cable Act. (App. at 70a-71a.) Once again, this federal law violation should not have been overlooked based on misplaced deference.

4. Instead of applying the Cable Act, the court of appeals embarked on a search for any "debatable" reason that might justify the County's denial of consent. The circuit court then latched onto one of the many rationalizations offered by the County: its "concern[s] about Allen's true net worth and about the relationship of that wealth to the viability of the enterprise." (App. at 9a.)

In fact, the County's concern about Mr. Allen's net worth is incredible on its face. As co-founder of Microsoft, Mr. Allen's net worth is well known, and he submitted financial information to the County demonstrating his considerable financial assets. Moreover, Mr. Allen was not going to be the cable franchisee in the County; rather, he was becoming the majority shareholder of the corporate parent of Charter. The holder of the franchise was not changing, nor was Charter management changing. Furthermore, Mr. Allen was paying *cash* and *reducing* the outstanding Charter debt. (App. at 21a-23a; 61a; 76a-77a.) Mr. Allen's financial viability cannot be a serious issue.[8]

The County's "concern" that Mr. Allen overpaid for the company also cannot survive even mild scrutiny. First, the County's second-guessing of the valuation of a private corporate transaction is dubious. Second, as previously noted, Mr. Allen has the assets to support and grow the cable enterprise. Third, Charter could not raise future cable rates

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[8] The Ninth Circuit noted that Mr. Allen's net worth was not contractually obligated. (App. at 8a.) Yet, this misses the mark -- the previous Charter shareholders (like shareholders everywhere) had not obligated their own assets to Charter.

under applicable FCC regulations. Lastly and perhaps most importantly, as noted above, rates are governed by the Cable Act and are subject to very limited local jurisdiction.

While it is highly questionable whether the County's proffered reasons even satisfy the court of appeals' standard, it is clear that a less deferential review would lead to a different ultimate result. For this reason, this Court should examine the Ninth Circuit's application of a deferential standard that is contrary to the federal scheme established by the Cable Act.

C. This Court Should Grant Certiorari To Resolve Confusion About Applying Deference In The Cable Context

1. As noted above, *see supra* note 4, the lower courts have frequently struck down acts of local governments that violated the national policy established by the Cable Act. In none of these cases has the court believed the local government to be entitled to any special deference. The Ninth Circuit is in a distinct minority in its deferential approach. The conflict between the Ninth Circuit and these other courts regarding the deference due local governments when acting in the cable context warrants review by this Court.

2. More specifically, in other cases addressing transfers of control and other comparable circumstances, the lower courts, including even the Ninth Circuit, have applied the Cable Act without any special deference accorded the actions of the local franchising authority.

For example, in *MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356 (4th Cir. 2001), the County of Henrico had refused its consent to the transfer of control relating to AT&T's purchase of its franchisee, MediaOne. There, the county sought to condition its approval on MediaOne providing any requested Internet Service Provider access to its

cable modem platform. The Fourth Circuit held that this denial of consent was improper since the open access requirement was inconsistent with telecommunications law. *Id.* at 362-65 (citing 47 U.S.C. § 541(b)). In its review, the Fourth Circuit did not accord the local county and its actions any particular deference.

Similarly, in *Cable Alabama Corp. v. City of Huntsville,* 768 F. Supp. 1484 (N.D. Ala. 1991), the city attempted to withhold is consent to a transfer because the proposed transferee owned or controlled another cable television system in the area. The court held that the local government was acting outside its authority, concluding that the Cable Act "prohibits local franchising authorities from regulating the ownership or control of local cable television systems based upon ownership or control of any other cable television system." *Id.* at 1500. Again, the *Cable Alabama* court did not accord any deference to the city.

The Ninth Circuit reviewed a denial of transfer of control in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). The City of Portland sought to condition its consent to the AT&T purchase of Telecommunications, Inc., one of the nation's largest cable operators, on the provision of open access. Like the Fourth Circuit in *MediaOne*, the *AT&T* court concluded that this condition was contrary to Section 541(b). *Id.* at 876-77. In doing so, the Ninth Circuit panel did not accord any special deference to the local government's actions.

3. In contrast, the Sixth Circuit has relied -- erroneously, in Petitioners' view -- on deference in analyzing a local government's decisions on awarding and renewing cable franchises. *Communications Systems, Inc. v. City of Danville*, 880 F.2d 887 (6th Cir. 1989), involved a challenge by an unsuccessful bidder for a cable franchise. The appeals court relied on the "longstanding presumption that municipalities act properly" and the city's "considerable

discretionary authority." *Id.* at 891-92. In *Union CATV, Inc. v. City of Sturgis*, 107 F.3d 434 (6th Cir. 1997), the Sixth Circuit upheld a city's decision to deny a cable operator's proposal for renewal of its cable franchise based on the "considerable deference" the court believed due the actions of a municipality. However, that court also looked to a "preponderance of the evidence" standard, which is different than the more lenient evidentiary standard used by the Ninth Circuit in the instant case. *Id.* at 439-43.

There is evident uncertainty in the lower courts about whether and how much deference to accord a local government acting in the cable area. This Court should grant this Petition to clarify this issue and reaffirm the primacy of the national cable policy established by Congress.

II. A Cable Operator Does Not Waive Its First Amendment Rights Simply By Entering Into A Franchise Agreement With The Local Government

The Ninth Circuit's ruling that Charter waived its First Amendment rights by entering into the franchise agreement is contrary to this Court's exacting standards for waivers of fundamental constitutional rights. Given a regulatory scheme that requires cable operators to obtain a franchise, the court of appeals' conclusion that such franchise agreements constitute waivers is especially troublesome -- this decision serves to preclude any First Amendment challenge to the possibly unconstitutional acts of local governments against cable franchisees.

A. The Franchise Agreement Lacks The Intelligent, Knowing, And Clear Statement Required To Waive Fundamental First Amendment Rights

1. At the conclusion of the bench trial, the district court ruled that the County's withholding of its consent had violated the First Amendment rights of Petitioners. Applying the intermediate level of scrutiny of *United States v. O'Brien*, 391 U.S. 367 (1968),[9] the district court found that the County's denial of consent constituted a First Amendment violation because "the County's approach burdened substantially more speech than was necessary to further its legitimate interests" and because the "substantial governmental interest" identified by the County was, in the court's view, pure conjecture and speculation. (App. at 76a-77a.)

The court of appeals avoided the question of whether the County had infringed Petitioners' First Amendment rights, instead holding that these rights had been waived in the franchise agreement. The Ninth Circuit concluded that Charter had "waived its right to claim that a denial of [the] transfer violated its First Amendment rights" because Charter "voluntarily entered into an agreement under which the County had to approve any transfer of the franchise." (App. at 11a-12a.)

2. There can be no doubt that Charter and Mr. Allen, as current and potential cable operators, are First

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[9] Under *O'Brien*'s intermediate scrutiny test, a content-neutral government regulation must "further[] an important or substantial governmental interest" and be an "incidental restriction" on First Amendment freedoms that is "no greater than is essential" to the furtherance of the government's interest. *O'Brien*, 391 U.S. at 377.

Amendment speakers generally entitled to the protections that that amendment provides. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636, 637, 639 (1994); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494-95 (1986). The question of a waiver of federal constitutional rights is a "federal question controlled by federal law," *Brookhart v. Janis*, 384 U.S. 1, 4 (1966), and this Court has instructed that "every reasonable presumption against waiver" should be indulged before a waiver of constitutional rights may be found, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citation omitted). Furthermore, as this Court admonished in *Fuentes v. Shevin*, "in any context," a waiver of constitutional rights "must, at the very least, be clear." 407 U.S. 67, 95 (1972).

3. Even a cursory review of the franchise agreement reveals that the agreement did not purport to waive Charter's First Amendment rights. The Ninth Circuit pointed to no language in the franchise agreement suggesting a waiver and, in fact, no such waiver language exists. Rather, the franchise agreement expressly reserved for Charter the ability to challenge actions in court. The agreement also expressly limited the County's discretion in reviewing the transfer request: the County's consent could not be "unreasonably" withheld. This limited discretion granted by the franchise agreement is not broad enough to grant the County the ability to act unlawfully or unconstitutionally. *Owen v. City of Independence*, 445 U.S. 622, 649 (1980).

4. The Ninth Circuit's casual finding of a waiver by Charter cannot be sustained. The First Amendment "safeguards a freedom which is the 'matrix, the indispensable condition, of nearly every other form of freedom.'" *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967) (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)). "Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find

waiver in circumstances which fall short of being clear and compelling." *Id.* at 145. Charter's franchising agreement with the County lacks any clear and compelling statement of waiver.

5. The court of appeals' decision clashes with established law. The Ninth Circuit would create a rule that, by entering into a contract with the government, a speaker waives all rights to challenge the government's actions on First Amendment grounds. Such a rule, however, runs headlong into this Court's jurisprudence that the mere act of contracting with the government is not enough to waive all fundamental rights. *See Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

6. In addition, allowing franchise agreements to be used as the basis for findings of waivers of all First Amendment rights raises troubling issues as a result of the unequal power relationships. As the Seventh Circuit has noted, the undue leverage of local governments in these franchise negotiations makes them inappropriate for finding a constitutional waiver: "Of course in this case the only contract was the initial franchising agreement . . . and serious reservations arise when a local government with a virtual monopoly on cable access conditions a franchise contract with a programmer on the stipulation that the programmer waive certain constitutional rights." *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540, 1548 n.6 (7th Cir. 1989).[10]

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10 The only case cited by the appeals court below in support of its position was *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310 (8th Cir. 1991). In *Paragould*, the Eighth Circuit held that the cable franchisee had "effectively bargained away some of its free speech rights" by entering into the franchising agreement with the city. *Id.* at 1315. Charter notes the important distinction that the *Paragould* franchisee was

Footnote continued

The Ninth Circuit's decision sets a dangerous precedent. By transforming a relatively innocuous franchise contract into a *carte blanche* waiver of all First Amendment scrutiny by the courts, the Ninth Circuit has upended the standard for judicial review of the government's actions burdening protected speech. The court of appeals' decision is tantamount to a rule by which *all* cable franchisees -- and, indeed, all contractors with any government -- have effectively waived *all* of their First Amendment rights simply by entering into a contract in which the government may exercise some level of discretion.

B. Paul Allen Was Not A Party To The Franchise Agreement And Therefore Could Not Have Waived His First Amendment Rights

1. Finally, as a person who was not a party to the franchise agreement, Paul Allen, in particular, is entitled to have a court review the County's actions under *O'Brien*'s intermediate scrutiny standard. The Ninth Circuit ignored Mr. Allen's rights completely, ruling that "*Charter* was aware of what it was getting itself into" (emphasis added). (App. at 12a n.9.) Even assuming, *arguendo*, that the franchise agreement between Charter and the County constitutes a complete waiver of *Charter*'s First Amendment rights, it hardly can be said that *Mr. Allen*'s rights likewise were surrendered by an agreement he never joined.

Footnote continued from previous page

not challenging the city's conduct under the franchise agreement as Charter is doing here; instead, Paragould was mounting a facial challenge to the terms of the franchise agreement itself. *Id.* Nevertheless, to the extent that *Paragould* is consistent with the finding of waiver by the court of appeals here, Charter urges granting the writ of certiorari to correct the misguided doctrine found in *Paragould* and the instant case.

If, as this Court has stated, courts must "'indulge every reasonable presumption against waiver' of fundamental constitutional rights," *Johnson*, 304 U.S. at 464, the Ninth Circuit's *sub silentio* conclusion that Mr. Allen waived his First Amendment rights under a contract to which he never was a party simply cannot be countenanced. Therefore, summary reversal, or at least review by this Court, is appropriate.

III. A Local Government Does Not Engage In "Legislative Acts" When It Acts Pursuant To Contractual Obligations And Denies Consent To A Change Of Control Of Its Cable Franchisee

The court of appeals afforded the County substantial deference because it concluded that the County's denial of consent constituted a "legislative act." (App. at 6a.) However, by deeming the County's decision to withhold its consent to the transfer a "legislative act," the Ninth Circuit misconstrued the nature of the County's action and the applicable legal doctrines.

1. Here, the Ninth Circuit concluded that the County's decision was a "legislative" act based on three factors. First, the court of appeals noted that it was reviewing "a discretionary decision" of a "legislative body," the County's Board of Supervisors. Second, the court concluded that consents to a transfer of ownership for a franchise "should, a fortiori, be viewed as a legislative action" just as grants, renewals, and consents to rate increases are "legislative" acts. Finally, the court of appeals explained that the County's cable ordinance operates for the benefit of all the County's residents. (App. at 5a-6a.)

2. The Ninth Circuit's approach in this case is contrary to the more nuanced analysis proscribed by this Court and followed by the majority of the circuit courts of appeals. As this Court explained recently, "[w]hether an act is legislative turns on the nature of the act." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998).[11] A number of lower courts have rejected the notion that the formalities define whether an act qualifies as "legislative." Thus, "[n]ot all actions taken at a legislative meeting by a local legislator are legislative . . . . Nor does voting on an issue, in and of itself, determine that the act is legislative in nature." *Kamplain v. Curry County Board of Comm'rs,* 159 F.3d 1248, 1251-52 (10th Cir. 1998) (citing numerous cases). As *Kamplain* and the many cases that it cites demonstrate, the fact that Charter's consent to transfer was denied by the County's Board of Supervisors in a formal vote is far from determinative.

3. The court of appeals also cited to no precedent in support of its position that "grants, renewals and consents to rate increases" are invariably legislative acts. (App. at 5a-6a.) Certainly, questions arise as to whether this characterization of grants, renewals, and rate increases as legislative is accurate. More importantly, the appeals court failed to recognize that Charter's claim was for breach of its *contract* with the County. The County's actions were not

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11 The *Bogan* decision expressly left open the question of whether the formal legislative character of an action was sufficient to constitute a legislative act. *Id.* at 55. This Court found the ordinance in question in *Bogan* to be legislative "in substance" because it was a "policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents." *Id.* at 55-56. The Court contrasted this type of policymaking with the legislature's "hiring or firing of a particular employee" which would presumably not be legislative. *Id.* at 56.

"legislative" acts which formulated policy for future cases. Rather, they were actions which administered, and breached, the express terms of a pre-existing contact. As such, these acts by the County relating to the implementation of Charter's franchise agreement were administrative/executive and *not* legislative.

As this Court has explained, "[l]egislation . . . looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power." *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908). That is plainly not what the County was doing in denying Charter's consent to transfer. It was administering and implementing a contract, and such acts are not entitled to the "substantial deference" accorded legislative acts.[12]

A. The Ninth Circuit's Decision That These Are "Legislative Acts" Conflicts With Decisions Of Other Courts Of Appeals

The Ninth Circuit's conclusion that the County's denial of consent under its franchise agreement was a "legislative" act contrasts sharply with the analyses applied by other circuits.

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[12] In a footnote, the Ninth Circuit opined that the County is entitled to deference even if this was an administrative (and not legislative) act. (App. at 6a n.4.) Plainly, the County is not entitled to any *Chevron* deference since it is not acting in a rule-making capacity and has no special expertise. Rather, when acting pursuant to its contractual obligations, the County should be treated like any other party. The district court did exactly this and found the explanations offered by the County for refusing consent to be pretextual and unlawful.

1. Here, the County's decision to deny consent was an ad hoc decision and did not involve a prospective, legislative type rule. It addressed a single entity, Charter, and was undertaken pursuant to the provisions of Charter's franchise agreement with the County. Thus, the County was not engaged in "policy-making of a general purpose" or "line drawing." *Carver v. Foerster*, 102 F.3d 96, 100 (3d Cir. 1996). Nor did the denial of consent to Mr. Allen's purchase of Charter somehow "involve[] establishment of a general policy." *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1, 9 (1st Cir. 2000) (citation omitted). Accordingly, the Ninth Circuit erred in concluding that the County had engaged in "legislative acts."

2. In closely comparable situations, other courts of appeals have reached very different results from the court of appeals here. The Ninth Circuit's analysis squarely conflicts with the approach of the Sixth Circuit in *Wojcik v. City of Romulus*, 257 F.3d 600 (6th Cir. 2001). *Wojcik* also involved a local government's denial of consent to a transfer of control. In *Wojcik*, the Sixth Circuit confronted a case involving a city's refusal to allow a transfer of liquor and entertainment licenses to a prospective new owner. *Id.* at 603. Like here, the decision to allow the transfer of the licenses was within the city's discretion, as established by local ordinance. *Id.* at 613. The plaintiffs sought to characterize the city's denial of their request for transfer as a "legislative" action. *Id.* at 612. The Sixth Circuit disagreed. Instead, unlike the Ninth Circuit here, *Wojcik* rejected the plaintiffs' assertions that the action was "legislative" because it had been made by the city council and that the city council had been engaged in "policymaking." *Id.* at 612-13.

3. Other circuits have differentiated between the establishment of a zoning rule and the enforcement of that rule, holding that the former is a "legislative" act while the latter is not. *Bryan v. City of Madison*, 213 F.3d 267, 273 (5th Cir.

2000), *cert. denied*, 531 U.S. 1145 (2001); *Scott v. Greenville County*, 716 F.2d 1409, 1423 (4th Cir.1983); *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984).[13]

4. Even if the County's decision here were comparable to the awarding of bids and purchasing property, it would not be due the extreme deference granted by the Ninth Circuit. As the Tenth Circuit noted in *Kamplain*, contracting activity such as bids and purchasing was properly regarded as administrative or executive, and not legislative acts. "[W]e believe that the function of awarding of bids is essentially an administrative or executive function. Awarding bids and purchasing county property are actions whereby the Board applies known rules and legislation to make an administrative business decision." *Kamplain*, 159 F.3d at 1252-53 (and cases cited therein).

5. Indeed, the Ninth Circuit's decision here ignores its own previous holding that the "[a]dministration of a contract does not involve the formulation of policy." *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984). In *Cinevision*, the Ninth Circuit addressed a city council's decision to disapprove a proposed concert at a city amphitheatre where the city acted pursuant to the terms of the concert promoter's contract with the city. The *Cinevision* Court held that the city council's vote on a contract was not

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13 It is not the enactment of an overall plan or the establishment of a general policy, both of which could be said to be legislative in nature . . . . In our case the Planning Board merely decided to insist on completion of a particular road before granting approval of a specified proposed subdivision.

Cutting, 724 F.2d at 261. *See also Haskell v. Washington Township*, 864 F.2d 1266, 1277-78 (6th Cir. 1988).

"legislative" but, instead, "was simply monitoring and administering" the contract. *Id.* As the court explained then, "[a]dministration of a municipal contract -- a contract between a private party and a municipality -- would generally seem to be an executive function." *Id.*

6. In connection with this franchise agreement, the County is like any other contracting party acting pursuant to the bargain it struck. In denying Charter's transfer request, it is not making broad policy but engaging in an ad hoc determination which is administrative in nature.[14] The Ninth Circuit acted in direct conflict with other courts of appeals decisions in holding that the County's action here constitutes "legislative acts." This Court should grant this petition to resolve the conflict among the appeals courts and reverse the Ninth Circuit.

IV. The Issues In This Petition Are Important For The Cable Industry And Others

The Ninth Circuit's decision presents a significant problem for the cable industry. To put it bluntly, the Ninth Circuit's decision will allow local franchising authorities to wreak havoc on transactions in the cable television market. Moreover, the Ninth Circuit's striking conclusion that a contract with a government *a fortiori* creates a waiver of First Amendment rights threatens to leave any and all government contractors subject to the whims of the government with

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[14] The Ninth Circuit's suggested remedy for the County's actions -- that "citizens can vote out their local representatives and cable operators can refuse to enter into franchise agreements with notoriously difficult LFAs" (App. at 11a) -- demonstrates the fallacy of the court of appeals' reasoning. The County breached its franchise agreement, thereby injuring Charter and Mr. Allen; voting out the local representatives is not an adequate remedy for Petitioners' breach of contract action.

which they have contracted and without a remedy for violations of their First Amendment and other rights.

1. The potential effects on the cable industry could be dramatic.[15] Tens of thousands of cable franchise agreements throughout this country include provisions requiring local franchise authority consent to a transfer of ownership. Thus, the number of local franchise authorities whose consent is needed for transactions on the scale of the Charter/Allen transaction can be staggering. For example, along with the nearly 500 local franchising authorities involved in the Charter/Allen transaction, the merger of AT&T and TCI in 1999 involved 970 local franchising authorities and the recent merger of Comcast and AT&T involved approximately 1,200 local franchising authorities.

2. The Ninth Circuit's decision raises the prospect of local governments imposing considerable and improper costs on franchisees seeking consents to a transfer of ownership. The FCC has instructed that local franchising authorities may not use their transfer jurisdiction to delay or burden the transactions, or to "circumvent the [FCC]'s authority over rate regulation, franchise fees and other matters." 1993 Order at ¶ 38. Nevertheless, under the regime sanctioned by the Ninth Circuit, a local franchising authority's pretextual "concerns" over a transaction will be given such deference that these local governments are

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15 The importance of the issues raised by this case is reflected in the amicus briefs filed in the district court and court of appeals by the National Cable & Telecommunications Association, American Cable Association, and California Cable and Telecommunications Association, whose members include owners and operators of cable systems serving nearly 100 percent of the nation's cable television households. For the same reason, the National League of Cities and a host of local governments also filed amicus briefs in the courts below.

essentially encouraged to extort unlawful concessions from cable franchisees.

3. What occurred in this case is a prime example of the dangers of the Ninth Circuit's approach. Under the guise of its authority to review the transfer to Mr. Allen, the County made "take it or leave it" demands for Charter to pay a $500,000 "mitigation fee," to pre-fund a $39,000 due diligence study, and to agree to another rate freeze -- all demands that the district court found to be contrary to federal law. Nevertheless, the Ninth Circuit's decision immunized such unlawful demands from judicial review since the County was able to manufacture "some conceivable basis" that was "fairly debatable" for its refusal to consent. (App. at 7a.)

4. One can certainly expect that -- taking their cues from the County of Santa Cruz and the Ninth Circuit -- other local governments may use the transfer process to demand concessions and extract *quid pro quo*s from franchisees that otherwise would be unlawful under federal law.

The cumulative cost and burden resulting from such unlawful demands for concessions will create a marked barrier to transfers in the cable industry. Otherwise straightforward transactions will become infeasible. The Ninth Circuit's decision, therefore, threatens the industry consolidation and flow of capital needed to keep pace with technology, remain competitive in the marketplace, and deliver to consumers new programming, information, and broadband services. *See In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations*, 15 F.C.C.R. 9816, ¶¶ 1-2 (2000).

5. Finally, aside from the negative impact on the cable industry, the Ninth Circuit's decision has the potential for sweeping ramifications for other government contractors.

The court of appeals' decision undermines the heretofore accepted notion that a government's rights and duties under a contract with a private party are no different than the rights and duties created by contracts between purely private parties. *See, e.g., United States v. Winstar*, 518 U.S. 839 (1996). Second, the Ninth Circuit's decision also has grave First Amendment implications for private parties contracting with governments. The Ninth Circuit's holding would suddenly transform nearly every government contract into an automatic waiver of any right to challenge the government's actions on First Amendment grounds. It also would open the way for findings of broad waivers of due process, property, and other fundamental rights, thereby precluding challenges of unconstitutional governmental actions.

Given the far-reaching implications to the cable industry and other government contractors, this Petition plainly presents issues of exceptional and recurring importance warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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